FILED
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No. 287

IN THE

# SUPREME COURT

OF THE

## United States

**October Term, 1956**

ERWIN P. WERNER,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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# APPENDIX

## OPINIONS BELOW

**Erwin P. WERNER, Appellant,**

**v.**

**UNITED STATES of America, Appellee**

**No. 14410.**

United States Court of Appeals
Ninth Circuit.
March 31, 1956.

Morris Lavine, Los Angeles, Cal., for appellant.

Perry W. Morton, Asst. Atty. Gen., Harold S. Harrison, John F. Cotter, Fred W. Smith, Attys., Dept. of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., Joseph F. McPherson, Asst. U. S. Atty., Los Angeles, Cal., for appellee.

Before STEPHENS, FEE and CHAMBERS, Circuit Judges.

CHAMBERS, Circuit Judge.

Plaintiff-appellant's predecessors in the title on February 1, 1943, leased 40 acres adjacent to March Field, Riverside County, California to the government for military purposes. The agreed rental was $25 (sixty-two and one-half cents per acre) per year. The initial term of the lease was for the five month period ending June 30, 1943. However, the lease contained the following clause:

"This lease may, at the option of the Government, be renewed from year to year at a rental of $25.00 per year, and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least 30 days before this lease or any renewal thereof would otherwise expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond six months from date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941." (Proclamation 2487 (50 U.S. C.A. Appendix, note preceding section 1))

After the execution of the lease a modification was made with respect to "notice of renewal." (The modification is not material here.) At the time the complaint was filed herein on August 28, 1951, the government had remained constantly in possession since 1943, paying or tendering payment each year of the sum of $25.

By November, 1949, Werner had become dissatisfied and began his first attempt to "break out" of the lease. That was a suit to reform the lease to provide that it should terminate "six months from the date of cessation of the hostilities of the Axis Nations then at war or the surrender of the Axis Nations" rather than at the termination of the national emergency. A plea of the statute of limitations was dispositive of the case without the consideration of substantive questions, *Werner v. United States*, 9 Cir., 188 F. 2d 266.

The second action filed as aforesaid on August 28, 1951, asserted and plaintiff-appellant Werner proposed to prove as a matter of fact that "the unlimited national emergency, as declared by the President of the United States on May 27, 1941," had expired prior to commencement of this second action. He prayed for the reasonable rental value after the termination of the "national emergency."

In the district court the government obtained a dismissal upon a plea that the judgment was *res judicata*. A second appeal followed. This court thereupon held that the new issues of the second complaint were not *res judicata* under the first action and further held that plaintiff was entitled to a trial and entitled to prove, if he could, that the national emergency, as declared on May 28, 1941, had terminated prior to commencement of the second action. *Werner v. United States of America*, 9 Cir., 198 F. 2d. 882.

When the case was returned to the district court, the government answered that the national emergency terminated on April 28, 1952, by Proclamation 2974, 17 F.R. 3813, 50 U.S.C.A. Appendix, note preceding section 1. If that be true, then the lease would have expired October 28, 1952, i. e. six months after the proclamation.

At trial, plaintiff's sole contention was that the national emergency expired with the approval by the President on July, 25, 1947, of S.J. Resolution No. 123, Public Law 239 of the 80th Congress, 61 Stat. 449. Section 3 of the resolution read as follows:

"In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941." See 50 U.S.C.A. §171 note.

And one of the statutes listed thereunder was the "Act of July 2, 1917, 40 Stat. 241, as amended." See 50 U.S.C.A. §171.

Necessarily that involves an examination of 50 U.S.C.A. §171. It reads as follows:

"The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price

for the same, which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further*, That the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further*, That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes."

At the trial the district judge held Werner's lease was not affected by S.J. Resolution 123 of July 25, 1947. This appeal followed.

(1) This court holds the trial court was correct and bottoms its decision on two grounds. First, this court is not satified that plaintiff's lease was acquired solely under 50 U.S.C.A. §171, or at all. The government acquired property for war uses under many statutory authorizations. To list them all would be exhaustive.

Second, as this court construes the effect of Resolution 123 on 50 U.S.C.A. §171, it could have only a prospective effect: the government could make no more

purchases and initiate no new leases. The section is one for acquisition. Termination of the right to make new acquisitions does not lead to the *non sequitur* that rights under existing leases were thereby lost.

(2-4) In the foregoing views, one does not reach the question of legislative authority to declare the emergency at an end for such a purpose as terminating plaintiff's lease.[1] The trial court thought only the executive could ascertain the fact of the termination of the emergency and declare it so. Perhaps this is right. But it need not be considered here.[2]

*Sua sponte,* this court raised at oral argument a question of whether the lease violated California land law, i. e. the rule against perpetuities. In the present world instability it is of course not facetious to think of a national emergency lasting beyond the traditional "lives in being and 21 years thereafter," and so one may think of the rule against perpetuities.

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[1] At first blush, one does find difficulty in justifying a proposition that "the emergency was over" for the purposes of acquiring more leases, but "the emergency was not over" for the purpose of ending a lease which was to end with the emergency. But the fundamental doctrine of separation of powers of government requires that the executive branch makes the leases after being authorized by the legislative branch to do so. Similarly, it is an executive matter to administer and terminate leases. A court should avoid a construction, if possible, that the legislative branch was usurping the executive's function.

[2] The second *Werner* case, 9 Cir., 198 F. 2d 882, went back to the district court to allow Werner to prove as a matter of fact that the emergency had terminated at a date between May 1948 and December 1950. No such proof was offered.

While the tendency is to leave the determination of the end of emergency to the executive branch, it is conceivable that international affairs could again achieve such placidity that a court could venture to take judicial notice that an emergency had ended, absent any such determination by the executive. *See Block v. Hirsh*, 256 U.S. 135, 41 S.Ct., 458, 65 L.Ed. 865; *Pouquette v. O'Brien*, 55 Ariz. 248, 100 P. 2d 979.

A parallel would be that the fact being indisputable, the Congress could proceed upon the same presumption. Further, it should be kept in mind that in the complexities of "terminating" wars today, there necessarily will be questions of constructions as to what action the executive has really taken.

The matter having been so raised the parties were requested to file briefs.

(5) One of the most succinct statements in reported cases in California on the nature of the rules in the state is to be found in the *In re Estate of Sahlender*, 89 Cal. App. 2d 329, 201 P. 2d 69, 79, where it is said:

> ". . . in this state we have both the rule against restraints on alienation, with its statutory period of lives in being or twenty-five years, and the rule against remoteness of vesting, with its common-law period of lives in being and twenty-one years."

The statement is simple but in the application of the rules the courts have had many difficulties. See "Perpetuities and Restraints; a Needed Reform, by Henry Coil," 30 California Bar Journal 83.

(6, 7) It would seem that there is no problem of remoteness of vesting here under California law. As to a restraint on alienation, California squarely holds that there is no violation of the rule if at all times there are in existence parties who could join together and convey complete title. This the government and Werner (or his predecessors) could have done at all times. The cases of *In re Estate of Sahlender, supra; In re McCray's Estate*, 204 Cal. 339, 268 P. 647, and *Blakeman v. Miller*, 136 Cal. 138, 68 P. 587 appear to dispose of the questions. Indeed, a close examination of *In re Walkerley's Estate*, 108 Cal. 627, 41 P. 772, the only case cited by Werner, indicates it is no more favorable to plaintiff than the other cases.

If our analysis of California's land law be not correct, it is enough to say that plaintiff Werner was given an opportunity to prove that the emergency had in fact ended. He did not bear the burden of proof.

Also, the government is probably correct that here we should not notice the point of perpetuities, it not having been raised below or made the subject herein of any specification of error. In this court's view, when the case went back to the trial court for the second time, the only question open for consideration was whether the emergency had in fact ended—unless, perhaps some illegality shocking to the conscience of the court became apparent.

There is the possibility of great inequity when the government attempts to condemn a leasehold on the terms of Werner's lease. The government, for a nominal consideration, takes the property on a basis of practically neutralizing its value. The fee may become virtually unmarketable. See *United States v. Baumann,* D.C., 56 F. Supp. 109.

What the government was trying to do in *Baumann* would seem to justify some kind of judicial interference by a trial court in the posture of the case under Oregon condemnation law.

But here, as this case comes to this court, Werner's predecessors apparently voluntarily entered into the lease. If it should violate the rule against perpetuities in California, the point having not been noticed below or even herein, it is probably not the sort of agreement so shocking to the conscience of a court that an appel-

late court, *sua sponte*, should strike it down. Cf. *Oscanyan v. Arms Co.*, 103 U.S. 261, 26 L. Ed. 539.

The judgment is affirmed.

STEPHENS, Circuit Judge (concurring).

I concur, but because I think the issue of the rule against perpetuities was fortuitously and inadvisedly brought into the case, I express no opinion on that subject.

JAMES ALGER FEE, Circuit Judge, concurring in result.

Whatever the rights of plaintiff, he did not take prompt and effective measures to bring an end to the term of the United States created by the execution of the original lease. The two previous cases in this Court make this clear. Upon the last remand, there was a direction to try a single question of fact. But that was not tried.

In view of the fact that none of the questions considered was properly before the trial court or, in my opinion, before us, I am constrained to concur in the result only.

[Title of District Court and Cause.]

## MEMORANDUM OF OPINION

On the 1st day of February, 1943, Mark L. Herron and Barbara W. Herron, husband and wife, entered into a lease with the United States of America, covering forty acres of land near the March Field air base at Riverside County, California. The lease provided for payment of $25.00 per year rental, and further provided that occupancy of the premises could not be extended beyond "six months from the date of the termination of the unlimited National Emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487)."

On May 17, 1948, Mr. and Mrs. Herron deeded the property covered by the lease to the plaintiff herein. Subsequent to said transfer, plaintiff filed an action in this [40] United States District Court praying that the lease be reformed so as to provide for its termination "six months from the date of cessation of the actual hostilities of the Axis Nations then at war or the surrender of said Axis Nations." The government moved for dismissal of the action on several grounds, among them that the action was barred by the statute of limitations. The court found the action was so barred and dismissed it "for want of jurisdiction over the United States." On appeal the District Court was affirmed (*Werner v. United States*, 188 F. 2d 266).

Subsequent to that decision Werner then brought this action, alleging a number of facts which he claimed, brought the emergency to an end so far as

it related to the lease in suit. The government did not choose to plead to the merits of the complaint as filed but pleaded the judgment in the earlier action as *res adjudicata*. This court examined the opinion as rendered by the Ninth Circuit in the *Werner* case, *supra*, and found therein a statement:

> "There has been no '. . . termination of the unlimited national emergency . . .' declared by President Roosevelt on May 27, 1941, by Proclamation 2487."

Upon the basis of that statement this court in the instant case further determined and decreed that the unlimited national emergency had not been terminated.

In *Werner vs. United States*, 198 F. 2d 882, the Ninth Circuit, commenting upon its previous decisions, said:

> ". . . We hold that this court did no more than affirm the judgment appealed to it. In our opinion we did state that there had been [41] no termination of the emergency but this statement was a mere recital of the undisputed fact that no official termination of the emergency had been pronounced."

The Circuit then reversed and remanded the case, stating:

> ". . . Appellant is entitled to his day in court . . ."

The matter now comes on for hearing for the third time—to give plaintiff his "day in court" as directed

by the Circuit. At the hearing plaintiff did not in any manner attempt to prove any basis for the allegations contained in his amended complaint to show the national emergency had been brought to an end but, instead, contended the national emergency was terminated by a Joint Resolution of Congress dated July 25, 1947, Public Law 239, 80th Cong., 1st Sess., Chapter 327 (61 Stat. 449).

Section 3 of the Joint Resolution recites:

> "In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941."

It is plaintiff's contention that the lease in question was acquired under §171, Title 50, U.S.C.A., and that this Act was specifically mentioned in Section 3 of the Act of July 2, 1917, as amended. [42]

The government contends the national emergency was not terminated by the Joint Resolution of Congress but, on the other hand, was terminated by an official proclamation made by the President on April 28, 1952, in which is stated:

> "Now, Therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day . . ." [66 Stat. C31 at C32].

If the national emergency with which we are concerned in this litigation was terminated by the Joint Resolution of Congress on July 25, 1947, plaintiff is entitled to a recovery in this action. On the other hand, if the national emergency did not terminate until President Truman's Proclamation on April 28, 1952, plaintiff is not entitled to judgment.

The problem thus presented is two-fold:

1. Can a national emergency proclaimed by the President be terminated by Congress, and

2. If Congress may terminate a national emergency, did the Joint Resolution of July 25, 1947, terminate the national emergency as proclaimed by President Roosevelt?

There has been no contention that anyone other than the President may issue a Proclamation determining the existence of a national emergency. There is no suggestion that the other two branches of government, or either of them—judicial or legislative—may in any way usurp the duties of the President by declaring the existence of a national emergency. If the President is the only one who may [43] declare a national emergency, is he alone empowered to terminate it?

The Supreme Court discusses the problems here involved in *Ludecke v. Watkins*, 335 U. S. 160 at 170, as follows:

> "The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that 'a state of war

> still exists.' . . . The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany, and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President . . . These are matters of political judgment for which judges have neither technical competence nor official responsibility."

It seems to this court the determination that a national emergency existed is a matter of political judgment, and determination that the national emergency no longer exists is also a matter of political discernment, which judges have "neither technical competence nor official responsibility" to decide. If this is a matter which has been given exclusively to the executive branch of government and the judicial branch has no official responsibility therein, it would also seem to this court that the legislative branch has no right to determine matters of political judgment.

This point of view is substantiated by the President's action when (even though Congress by a Joint Resolution on July 25, 1947, determined the national emergency [44] had ceased) he, nevertheless, on April 28, 1952, issued a proclamation definitely declaring the national emergency as proclaimed by the President on May 27, 1941, "terminated this day." And further substantiation for this point of view is found in the opinion of the United States Supreme Court in *Knauff vs. Shaughnessy*, 338 U. S. 537, decided January 25,

1950, nearly three years after the date of the Joint Resolution. The Supreme Court said, at page 546:

> ". . . The national emergency has never been terminated. Indeed, a state of war still exists."

Plaintiff at bar contends, however, that the foregoing opinion is not in point because the Supreme Court was discussing legislation relative to war brides, and the statement that "the national emergency has never been terminated" must be restricted to the War Brides Act. The Court says, page 546:

> ". . . The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941."

It is after this quoted statement that the Court goes on to say: "The national emergency has never been terminated."

If we read into the Supreme Court's statement, "in respect to the War Bride's Act," we are interpolating. It may be true that the Circuit Court may determine the Supreme Court did nothing more than affirm the judgment of the lower court, but, as we read the case, here is a statement that the national emergency had not been terminated; and in the light of [45] of other authorities this court is of the opinion that the national emergency as proclaimed by the President on May 27, 1941, was not legally and officially terminated until April 28, 1952, when the President of the United States issued a proclamation in which he stated the national emergency had been "terminated this day."

As a consequence, this court is of the opinion that Congress by its Joint Resolution did not terminate the national emergency and, therefore, the plaintiff in this action is not entitled to recover.

Findings of Fact, Conclusions of Law and Judgment in conformity with this opinion will be prepared by defendant for presentation for signature on or before the 15th day of March, 1954.

Dated: March 1, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed March 2, 1954. [46]

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 287

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ERWIN P. WERNER, *Petitioner*

v.

UNITED STATES OF AMERICA

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-9, R. 56-62) is reported at 233 F. 2d 52. The opinion of the District Court (Pet. App. 10-16, R. 37-44) is reported at 119 F. Supp. 894.

### JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1956 (R. 63). On June 27, 1956, by order of Mr. Justice Burton, the time within which to file a petition for a writ of certiorari was extended to

July 28, 1956. The petition was filed on July 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, when the terms of a lease provided that it was to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941," the lease continued until six months after a subsequent Proclamation of the President declaring the termination of the national emergency proclaimed on May 27, 1941, notwithstanding his earlier approval of a Joint Resolution of Congress terminating authority for new acquisitions of property under Acts of Congress which are in effect only during periods of war or national emergency.

## PRESIDENTIAL PROCLAMATIONS INVOLVED[1]

1. So far as here material, the President's Proclamation (No. 2487) of May 27, 1941, 55 Stat. 1647, declared:

> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

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[1] Section 3 of the Joint Resolution approved July 25, 1947, 61 Stat. 451, is set out in the Argument at p. 5, *infra*.

2. So far as here material, the President's Proclamation (No. 2974) of April 28, 1952, 66 Stat. C31, declares (C32):

> Now, therefore, I, Harry S. Truman, President of the United States of America, do proclaim that the national emergencies declared to exist by the proclamations of September 8, 1939, and May 27, 1941, terminated this day upon the entry into force of the Treaty of Peace with Japan.

## STATEMENT

On February 1, 1943, Mark L. Herron and his wife leased to the United States about 40 acres of land for $25 a year (R. 13-22). The lease was to terminate six months "from the date of the termination of the unlimited National Emergency, as declared by the President * * * on May 27, 1941 (Proclamation 2487)" (R. 15, 22).

On May 17, 1948, petitioner became owner of the leased property, and on July 23, 1951, he filed this suit (R. 3-32).[2] He alleged that the unlimited national emergency proclaimed on May 27, 1941, had ended by virtue of a series of stated events (R. 6-11), that consequently the lease terminated "between May 7, 1948, and December 6, 1950" (R. 12), and that he

[2] In a prior suit, the petitioner attempted to obtain reformation of the lease here involved to recover for the alleged reasonable value of the use and occupancy of the premises since August 14, 1945, upon which date he alleged the lease was intended to terminate. The District Court found that the action was barred by the statute of limitations and dismissed the suit for want of jurisdiction over the United States. The Court of Appeals affirmed. *Werner* v. *United States*, 188 F. 2d 266 (C.A. 9).

was entitled to $10,000 for the Government's subsequent use of the land (R. 12-13).

The District Court dismissed the complaint on the ground that the prior action referred to in note 2, *supra*, barred the claim as *res judicata*. The Court of Appeals reversed and remanded the action (198 F. 2d 882), holding that petitioner should be given an opportunity to prove that the national emergency had ended as he alleged. The United States then answered (R. 33-37) that the President's Proclamation (No. 2974) of April 28, 1952, 66 Stat. C31, declared the termination of the emergency proclaimed on May 27, 1941. The trial court so held (R. 37-44), and appropriate findings of fact and conclusions of law were filed (R. 44-47). Accordingly, judgment was entered awarding petitioner $183.15, the rent due from June 30, 1945, to October 28, 1952, six months after termination of the emergency (R. 48-49). This rent had previously been tendered by the United States and refused by petitioner (R. 46-47). The Court of Appeals affirmed (Pet. App. 9).

## ARGUMENT

The petition seeks review by this Court, as a further step in an already protracted litigation, of a plainly unsubstantial claim. The lease in question has long since expired, as has the emergency of which the duration is asserted by petitioner to have been in doubt. And this alleged doubt is neither a serious one nor a matter of any general importance.

To support the allegations in his complaint that the national emergency, proclaimed by the President on

May 27, 1941, had been brought to an end by December, 1950, petitioner relies on the Joint Resolution of Congress dated July 25, 1947, 61 Stat. 449. Section 3 of that Resolution (61 Stat. 451) provided:

> *In the interpretation of the following statutory provisions*, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941.
>
> * * * *
>
> Act of July 2, 1917 (40 Stat. 241), as amended * * *. [Emphasis added.]

The 1917 Act, as amended (50 U.S.C. 171), referred to in the Resolution, is a permanent authorization under which the Secretary of the Army may acquire land through condemnation proceedings. It contains the following proviso:

> *That when such property is acquired in time of war, or the imminence thereof*, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. * * * [Emphasis added.]

Petitioner is obviously mistaken in his reliance on the fact that the foregoing provision is included among those affected by the Joint Resolution of July 25, 1947.

His argument fails—apart from the fact that it is, in our view, precluded by *res judicata*[3]—because (1) the termination of the authority for *immediate possession and occupancy* upon the institution of condemnation proceedings cannot be read as ending the emergency declared by the President for other purposes, including the construction of the lease involved here; and (2) leaving no doubt of this, Congress and the courts have recognized that the emergency continued to exist after the date of the Joint Resolution.

As the court below held (Pet. App. 5-6), even insofar as the Joint Resolution of July 25, 1947, ended the emergency basis for immediate occupancy and possession, it cannot be read to have affected rights already acquired. The statutory language is plain enough on this point. Its history eliminates any possibility of question. See S. Rep. No. 339, 80th Cong., 1st Sess., p. 7.

It is to be noted, moreover, that the lease in question did not require the authority of 50 U.S.C. 171 either for its creation or its duration, so that the effect of the Joint Resolution on this statute is wholly academic in this case. There was no condemnation here

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[3] At the time petitioner filed his first complaint on November 8, 1949, *Werner* v. *United States*, 10 F.R.D. 245 (S.D. Calif.), affirmed, 188 F. 2d 266 (C.A. 9), his contention that the national emergency in question was terminated by the Joint Resolution of July 25, 1947, was an "available matter" in an action between the same parties which could have been raised and finally determined. We believe, therefore, that the judgment in that first suit should properly have been considered *res judicata* in the second action, although this view was rejected by the court below on the appeal preceding the one involved here. *Werner* v. *United States*, 198 F. 2d 882. Cf. *Chicot County Dist.* v. *Bank*, 308 U.S. 371, 378.

at all, but only a contract. And, as the trial court found (Fdg. 6, R. 47), there was at all pertinent times valid statutory authority for leasing the property which was far more clearly applicable than 50 U.S.C. 171. Under the provisions of Section 1(a) of the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U.S.C. App. 1171, the Secretary of War (now the Secretary of the Army) was expressly authorized to make leases and other contracts for the acquisition of land for a broad range of military purposes. That authority, plainly appropriate in the case of the lease here, remained in force and was repeatedly extended by Congress long after the 1947 Joint Resolution. See Act of April 14, 1952, 66 Stat. 54, 55; Act of July 3, 1952, 66 Stat. 330, 331; Act of March 31, 1953, c. 13, 67 Stat. 18; Act of June 30, 1953, 67 Stat. 131, 132.

These statutory extensions, in turn, supply still further demonstration of petitioner's error in seeking to show a Congressional termination of the national emergency which could affect the construction of the lease in this case. Thus, in the Act of April 14, 1952, *supra*, extending the plainly pertinent land acquisition authority to which we have referred, Congress spoke of the "termination hereafter" of the national emergency proclaimed on May 27, 1941, explicitly stating its knowledge that there had been no such termination yet. Similarly, authority flatly refuting petitioner's claim is found in the decisions of this Court and the lower federal courts. *Woods* v. *Miller Co.*, 333 U.S. 138, 140, fn. 3 (noting that, on the very occasion of his approval of the 1947 Joint Resolution, the President said: "The emergencies declared by the

President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency power."); *Knauff* v. *Shaughnessy*, 338 U.S. 537, 546; *American Houses* v. *Schneider*, 211 F. 2d 881, 884 (C.A. 3); *United States* v. *Certain Parcels of Land*, 102 F. Supp. 691, 695 (W.D. Pa.), rejecting the proposition petitioner asserts here with the sufficient answer that in the Joint Resolution of July 25, 1947, Congress "was not terminating the national emergency as defined in leases or condemnation petitions by which the land on which the projects were located were acquired * * *."

Since Congress never undertook to effect the kind of termination petitioner claims, there is no occasion to reach petitioner's proposed question (Pet. 15-17) as to the power of Congress to take such action. Furthermore, since the national emergency involved has long been terminated in any event (Proclamation 2974 of April 28, 1952, 66 Stat. C31) there is no issue of present importance in this case.[4]

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[4] Certainly, the asserted questions on the California rule against perpetuities (Pet. 11, 14)—decided adversely to petitioner by the court below, with the additional observation that this problem was probably not open on his appeal (Pet. App. 6-9)—supply no basis for certiorari. Even if these could be regarded as matters warranting review by this Court, it is abundantly clear, in California as elsewhere, that the rule against perpetuities has no bearing on leases of present interests, but "relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time." *Estate of McCray*, 204 Cal. 399, 406, 268 Pac. 647, 650; *Estate of Sahlender*, 89 Cal. App. 2d 329, 343, 201 P. 2d 69, 77. See Gray, *The Rule Against Perpetuities* (4th ed., 1942), sec. 4. Since this is so, the supposed question of choice between federal and state law to govern the lease in this case (Pet. 18-19) does not exist.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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